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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 668

MANUFACTURERS TRUST COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

DONALD MARKS,
JULIUS B. BAER,
DAVID STOCK,
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Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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No. 668

MANUFACTURERS TRUST COMPANY,
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vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The above named petitioner, by the undersigned, its attorneys, respectfully prays that a Writ of Certiorari to the Court of Claims of the United States of America may issue to review the judgment of that court made upon the 1st day of April, 1940, in the above mentioned cause.

Statement of Proceedings in Court Below.

This cause arose under the provisions of Section 800 of the Revenue Act of 1926, and Subdivision 10 of Schedule A of Title VIII of the Revenue Act of 1926, as added by Section 8 of the Silver Purchase Act of 1934 (48 Stat. 1179).

Petitioner, on January 29, 1936, duly filed with the Collector of Internal Revenue, Second District of New York, returns or memoranda for each of thirteen sales of silver bullion (Finding 24, R. 15), and stamp taxes aggregating $74,969.66 were paid the said Collector by petitioner on January 30, 1936, under protest (Finding 25, R. 15). Petitioner thereafter filed a claim for refund of $12,439.53 thereof, which claim was rejected in full by the Commissioner of Internal Revenue on February 6, 1936 (Finding 27, R. 16). Thereafter, petitioner filed amended returns (Finding 29, R. 16) and paid additional stamp taxes to the Collector of Internal Revenue of the Second District of New York, in the sum of $1,047.55, under protest (Finding 30, R. 16). Thereafter, petitioner filed a claim for refund of the said amount of $1,047.55, which claim was rejected in full by the Commissioner of Internal Revenue on June 11, 1936 (Finding 32, R. 16).

Petitioner thereupon brought suit against the United States of America, in the Court of Claims, to recover the sum of $13,487.08 erroneously and illegally withheld from it. The Court of Claims, in a decision rendered on the 1st day of April, 1940, denied petitioner's suit to recover said sum of $13,487.08, and dismissed its petition (R. 21).

On May 28, 1940, petitioner moved before the Court of Claims for a new trial or rehearing of the said action. This motion was overruled by the Court of Claims on October 7, 1940 (R. 21).

Opinion Below.

The opinion of the Court of Claims is reported in 32 F. Supp. 289. The order overruling petitioner's motion for a new trial or rehearing is not officially reported. See R. 21.

Jurisdiction.

The judgment of the Court of Claims was entered on April 1, 1940. The order of the Court of Claims overruling

the motion for a new trial was entered on October 7, 1940. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Summary Statement of Matter Involved.

Petitioner claims that the tax should have been computed on the profit on the entire quantity of two million ounces of silver bullion, instead of on the profit on the first eleven hundred thousand ounces only. The remaining nine hundred thousand ounces were sold at a price that reduced the aggregate profit; and petitioner urges that the two million ounces constituted a single interest in silver bullion, and that its sale, though consummated in several instalments, constituted a single "transfer" of an interest in silver.

Petitioner's view is supported by certain findings of fact made by the Court of Claims.

Petitioner's purchase of silver bullion was an isolated investment of funds freed from German standstill credits, and with a view to recoupment of the loss sustained in the conversion of the foreign exchange (Findings 2, 3, 4, 5, 6, 7; R. 9-10).

The silver bullion was purchased in London in eight instalments from September 6, 1934, to October 5, 1934, a procedure made necessary by market conditions (Findings 7, 8; R. 10).

In December, 1935 various considerations led petitioner to decide to sell all of its silver bullion (Findings 10, 11, 12; R. 10-11). It was sold in instalments, as market conditions dictated, over the period from December 3, 1935, to January 6, 1936 (Findings 13, 14, 15, 16; R. 11-13).

The sales made from December 3 to December 17 were at prices above average cost; the remainder at prices below average cost (Finding 15; R. 13).

The method of selling in instalments was found to have been a reasonable and proper method of disposing of such a substantial quantity of silver bullion in the light of contemporaneous conditions in the London market (Findings 17, 18; R. 13-14).

It was also found that petitioner regarded the entire lot of silver bullion as a single investment, and that in selling in instalments it did not consider that it was separately transferring different interests in silver bullion (Finding 19; R. 14).

The Commissioner of Internal Revenue ruled, and the Court of Claims has decided, that the Silver Tax must be paid on the profit of each separate sale which resulted in a profit (as defined by the statute), thereby rejecting petitioner's claim that the correct basis for computation of the tax was the profit on the entire two million ounces of silver bullion (Findings 22, 23, 25, 27; R. 15-16).

A further issue is presented by the disallowance of an item of legal expense as a proper deduction under the Statute (Findings 28, 29, 30, 32; R. 16).

Principal Questions Presented.

1. Is a tax upon the profits from individual sales, without allowance of any losses from related sales during any reasonable accounting period, a valid tax on income under the 16th Amendment?

2. Is the silver tax validly applied as an income tax when it is imposed upon the profit from each separate sale of a series of related transactions without allowance of the loss from any related sales in such series?

3. Is a tax on the profit from each sale of silver bullion, without regard to whether the vendor is engaged in the fabrication, use, or sale of silver bullion as a business, a valid excise under Article I, Section 8 of the Constitution?

4. Did the Court of Claims correctly construe the Statute in applying it to the facts in this case so as to hold that there were several interests in silver separately transferred?

5. Was the item of legal expense correctly disallowed as a deduction in computing the tax?

Statutes and Regulations Involved.

The pertinent statutes and regulations will be found in the Appendix (*infra*, pp. 26-27).

Reasons for Granting Writ of Certiorari.

This case involves an important fundamental constitutional question of general applicability as to the extent of the power of Congress to impose a tax on the profit from isolated transactions, either as an "income" tax or as an excise. The tax as applied in this case by the Court of Claims would establish a basis for taxation which is inconsistent with and repugnant to elementary constitutional principles.

In addition, the Court of Claims has erred in construing the Silver Tax Law and applying it to the facts of this case. This Court, as the only reviewing tribunal, is asked to take jurisdiction in the interest of substantial justice.

I.

As Applied in This Case the Silver Tax is Not a Valid Tax on Income.

The word "income" as used in the 16th Amendment is a limitation upon the power of Congress. Neither the legislative nor judicial branches of the government may, by definition or construction, enlarge the scope of that power.

Income arises from liquidation of a capital investment only after the investment has been recouped. Inherent in the concept of income is the idea of a periodic accounting.

If Congress, in disregard of these considerations, seeks to tax that which is not true income, its action may not be justified under the 16th Amendment.

A tax on the "profit" derived from each individual sale, *i. e.*, the difference between cost of goods and selling price, without regard to other sales during a reasonable accounting period, is not a tax on income.

The concept of an accounting period for determination of income has never been distorted to the point of calling each sale such a period.

This Court has called the Silver Tax a "special income tax," *United States* v. *Hudson*, 299 U. S. 498. As applied to the facts in the *Hudson* case, the law functioned as a tax on the income from a special class of transactions. As applied by the Court of Claims in this case, the law cannot be so justified, as it has been made a tax on gross receipts. As such, it is a direct tax, and hence invalid because not apportioned, *Constitution, Article I, Section 2.*

II.

The Silver Tax Cannot Be Supported as an Excise in Its Application to This Case.

The Court of Claims said that the Silver Tax is valid as an excise, though it also described it as an income tax, following this Court's determination that it is a "special income tax" in the *Hudson* case. A tax on the profit from sales of personal property is a direct tax. Direct taxes and excises are mutually exclusive classifications under the Constitution. This tax cannot be both.

It is submitted that the Silver Tax, to the extent that it is properly applied, is an income tax, but that it cannot be supported at all as an excise. An excise is a tax upon the exercise of some privilege or function, other than the exercise of essential rights of ownership of property. A tax

on sales by a person engaged in the business of fabricating or buying and selling silver would be a valid excise. On the other hand, a tax on sales of silver by every owner thereof, as is the silver tax, is clearly a tax on ownership. "The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded." *Nicol* v. *Ames*, 173 U. S. 509, at 521.

If the Silver Tax had been an excise, the retroactive features approved in the *Hudson* case would have been invalid. The Government argued in that case that it was an income tax; but here it has sought to justify it as an excise, and the Court of Claims has called it both, ignoring the constitutional segregation of the two classes of tax.

III.

It Was Not Necessary for the Court of Claims to Apply the Statute as it Did to the Facts of This Case.

The Statute imposes the tax upon every transfer of an interest in silver bullion. The Court of Claims found that petitioner purchased the silver as a single investment with funds derived from a single source (Findings 5, 6, 7, 8, 19; R. 9-10, 13); that it was held for the purpose of recouping the loss sustained in the liquidation of German credits (Findings 5, 6; R. 9, 10); that it was regarded by petitioner as a single investment and that both in its purchase and sale petitioner considered that it was engaged in a single transaction (Finding 19; R. 14); and that it was sold in instalments as a reasonable and prudent method of marketing a large quantity of silver bullion in the light of existing conditions and the character of the London market (Findings 17, 18; R. 13-14).

On these facts there was no need or justification for concluding that the several instalments sold constituted sep-

arate interests, separately transferred. The Court's view that petitioner's subjective consideration of the singleness of the investment and its disposal was immaterial is untenable as a matter of law. Petitioner's view was not in conflict with, but was supported by, objective tests. Both from this point of view, and that of the purpose of the Statute, the court below should have held that there was but one interest in silver bullion transferred, and that the tax should have been computed upon the "profit" on that interest.

IV.

The Disallowance of the Deduction for Legal Expenses Was Improper as a Matter of Law. The Statute Permits Deduction of "Necessary Expenses Actually Incurred in Holding, Processing or Transporting" the Interest in Silver Bullion.

Petitioner urged that the legal expense was incurred in holding its interest. The Government urged that it was in the nature of an overhead item. The Court below held that there was nothing in the Statute authorizing its allowance.

It was agreed that the expense was incurred only in connection with the acquisition of the silver, and the legal problems arising in connection therewith, and the tax liability arising out of its sale (Finding 21; R. 14-15).

As a penal statute the law should have been liberally applied; and the item should have been allowed as a necessary expense incident to the holding of the silver.

Conclusion.

For the reasons above set forth, as elaborated in the brief annexed hereto, your petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this

Court, directed to the Court of Claims, to the end that this cause may be reviewed and be determined by this Court, and that the judgment of the Court of Claims may be reversed, and that your petitioner, Manufacturers Trust Company, may have such other and further relief as this Court may deem proper in the premises.

Respectfully submitted,

BAER & MARKS,
By DONALD MARKS,
Attorneys for Petitioner.

Dated New York, N. Y., December 31, 1940.

Of Counsel:
DONALD MARKS.
JULIUS B. BAER.
DAVID STOCK.
MURRAY M. WEINSTEIN.

STATE OF NEW YORK,
County of New York, ss:

Donald Marks, being duly sworn, deposes and says: That he is a member of the firm of Baer & Marks, maintaining offices at 20 Exchange Place, Borough of Manhattan, City and State of New York; that he is a member of the bar of the Supreme Court of the United States and is an attorney for Manufacturers Trust Company, which was the plaintiff in the proceeding before the United States Court of Claims in the above entitled matter; that he makes this verification on behalf of Manufacturers Trust Company, as petitioner herein; that affiant has read the foregoing petition, was the attorney for said plaintiff Manufacturers Trust Company and has knowledge of this litigation; that the matters stated in said petition are true to the best of his knowledge, information and belief; that the foregoing petition is well

founded and entitled to the favorable consideration of this Court and that it is not interposed for the purpose of delay.

DONALD MARKS.

Subscribed and sworn to before me this 2nd day of January, 1941.

ROSE HOFFMAN,
Notary Public,
Kings County.

[SEAL.]

Kings Co. Clks. No. 404, Reg. No. 1073. Cert. Filed N. Y. Co. Clks. No. 367, Reg. No. 1H208. Commission expires March 30, 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 668

MANUFACTURERS TRUST COMPANY,
Petitioner,

vs.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR PETITIONER MANUFACTURERS TRUST COMPANY.

Specification of Errors to be Urged.

It is submitted that the Court of Claims erred:

1. In holding that the tax, *as applied,* upon the gains from the profitable silver sales without allowance of losses on related unprofitable silver sales, is a valid income tax; and in not holding that the tax, as so applied, is a tax on gross receipts and therefore a direct tax on capital and not a tax on income within the meaning of the 16th Amendment.

2. In holding that the decision in *United States* v. *Hudson*, 299 U. S. 498, established that the silver tax, as applied in this case, is valid as an income tax.

3. In holding that the silver tax is not a tax levied on property because of its ownership, but one levied upon the use made of the property, and that it is a valid indirect or excise tax, and in not holding that the right of disposition by every owner of a commodity and his right to the proceeds thereof, is an inherent and essential incident of ownership, and that a tax on such disposition and proceeds is a tax on ownership.

4. In holding that a tax on the profit from each sale of silver bullion, without regard to whether the vendor is engaged in the fabrication, use, or sale of silver bullion as a business, is a valid excise under Article I, Section 8, of the Constitution.

5. In construing the Statute and applying it to the facts in this case so as to hold that there were several interests in silver separately transferred.

6. In holding that the item of legal expense was correctly disallowed as a deduction in computing the tax.

Authorities and Argument.

A. As Applied in This Case, the Silver Tax Is Not a Tax on "Income" Within the Meaning of That Term in the 16th Amendment.

The 16th Amendment became necessary because of the ruling in the *Pollock* case that a tax upon the income from property is a direct tax and therefore subject to the provisions of Article I, Section (2) of the Constitution requiring apportionment. The 16th Amendment simply removes

this limitation in the imposition of a tax upon "incomes, from whatever source derived."

A tax upon the profits from the sale of personal property is a direct tax.[1]

It follows, therefore, that a tax upon the proceeds of sale of personal property, if not limited to income derived therefrom, does not come within the scope of the 16th Amendment, and therefore remains subject to the requirements of apportionment.[2]

The word "income" is used in the 16th Amendment in its ordinary and commonly understood sense.[3]

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[1] *Eisner* v. *Macomber*, 252 U. S. 189 at 205; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1.

[2] In *Eisner* v. *Macomber*, 252 U. S. 189, this Court said (at page 206):

"A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.

"In order, therefore, that the clause cited from Article I of the Constitution may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not 'income', as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, * * * For the present purpose we require only a clear definition of the term 'income', as used in common speech, in order to determine its meaning in the Amendment."

See also *Merchants L. & T. Co.* v. *Smietanka*, 255 U. S. 509.

[3] In *Merchants L. & T. Co.* v. *Smietanka*, 255 U. S. 509, this Court said (at page 519):

"In determining the definition of the word 'income' thus arrived at, this Court has consistently refused to enter into the refinements of lexicographers or economists, and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the 16th Amendment to the Constitution."

When a special tax is sought to be sustained as an income tax it must first be determined whether the subject of the tax is true income within the scope of the 16th Amendment. This requires an analysis of the meaning of the word "income" as used in the 16th Amendment. Was it intended that Congress should be empowered to tax only that which has always been understood to be income in the ordinary sense of the term, or is Congress free to determine for itself what constitutes income? The answer to this question is clearly supplied in *Eisner* v. *Macomber* (see note 2, *supra*).

The silver tax, as applied in the case at bar, is not a tax on "income". The method of determining income from sales of property for ordinary income tax purposes is to be found in Sections 22, 111, 113 and 117, Internal Revenue Code. Neither this method nor any commonly accepted method of determining income is observed in arriving at the tax base for computation of the silver tax.

The silver tax as applied in this case is not based upon any reasonable periodic accounting of profits from transactions in silver, nor does it have any relation to the existence or non-existence of such profits. The existence of profit as determined by some reasonable periodic accounting is fundamental to the concept of income.

If isolated silver gains can be taxed as "income" then Congress could likewise isolate gains from the profitable transactions in any mercantile business and impose an income tax on such gains, regardless of what the actual profits were, and even though the taxpayer may not have recovered its capital outlay in the cost of merchandise it had sold in any period. If Congress could do that, the shoe store proprietor could be compelled to pay an "income tax" on the proceeds of sale of only those shoes that are sold at a profit, without any regard for any sales of shoes at a loss, and without any regard for what his actual profits during any

period are, or, in fact, whether he has any profit at all. Such tax would not be a tax on income but on gross receipts or on capital; and, whether in the guise of an income tax or an excise, would be a direct tax on the property from which the gross receipts were received or on the capital, and would be invalid for lack of apportionment.

It may be further observed that the Treasury Department itself has recognized that the silver tax is not an income tax, in ruling that it is deductible in computing net taxable income for income tax purposes.[4]

Other Treasury rulings construing similar and analogous taxes of foreign countries have uniformly held that they are not income taxes for the purpose of permitting a credit under such provisions as Section 131 I. R. C.[5]

This Court has consistently construed the term "income" in various statutory contexts in its application to proceeds of sales of property as including only the proceeds in excess of cost of the property.

In the Corporation Excise Tax Act of August 5, 1909 (effective January 1, 1909) a tax was imposed upon all corporations for the privilege of doing business, based upon a certain percentage of the "income" of such corporations. This was sustained as an excise; but in so doing, this Court found it necessary to construe the word "income" in various applications. In *Doyle* v. *Mitchell Brothers Company*, 247 U. S. 179, the taxpayer had purchased timberlands in

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[4] I. T. 2899, June 1935, Cum. Bull. XIV-1 p. 67. In construing the application of Sec. 23 (c) of the 1934 Revenue Act permitting the deduction, in computing net taxable income, of "taxes paid or accrued within the taxable year, except (1) Federal income, war profits, and excess profits taxes * * *," the Treasury held that the silver tax is a stamp tax, not an income tax, and therefore deductible.

[5] See particularly I. T. 3193, Cum. Bull. 1938-1 p. 193, dealing with Art. 14 of the 1934 Mexican Tax Law; I. T. 3211, Cum. Bull. 1938-2, p. 177, dealing with taxes of certain Canadian Provinces; I. T. 2909, Cum. Bull. XIV-2-136 (1935), dealing with the Quebec Mining Act.

1903 at $20.00 per acre. On December 31, 1908, the stumpage value was $40.00 per acre. In determining income for the years 1909 to 1912, inclusive, under the Corporation Excise Tax Act, the taxpayer deducted from gross receipts the market value of stumpage as of December 31, 1908. The Commissioner assessed the tax on the basis of the original cost of the land as of 1903.

In this Court the Solicitor General argued that the "income" subject to tax should be determined by treating the entire proceeds of a conversion of capital assets as income.

This argument was rejected by the Court in a passage which is of vital significance in the case at bar.

> "Yet it is plain, we think, that by the true intent and meaning of the act the entire proceeds of a mere conversion of capital assets were not to be treated as income. Whatever difficulty there may be about a precise and scientific definition of 'income', it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; conveying rather the idea of gain or increase arising from corporate activities. As was said in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415: 'Income may be defined as the gain derived from capital, from labor, or from both combined.'
>
> "Understanding the term in this natural and obvious sense, it cannot be said that a conversion of capital assets invariably produces income. If sold at less than cost, it produces rather loss or outgo. Nevertheless, in many if not in most cases there results a gain that properly may be accounted as a part of the 'gross income' received 'from all sources'; and by applying to this the authorized deductions we arrived at 'net income'. *In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration.*" (Italics supplied.) (Pp. 184, 185.)

In *Goodrich* v. *Edwards*, 255 U. S. 527, the question was whether taxable gain on the sale of stock was to be determined as against the actual cost, or as against the value on March 1, 1913, which, under the statute, was fixed as the basis for determination of gain or loss. The purchase price of the stock in 1912 was about $291,600. The value as of March 1, 1913, was about $148,000. The selling price in 1916 was about $269,000. This Court held that an assessment based upon the difference between the selling price and the March 1, 1913 value was erroneous, saying:

> "It is thus very plain that the statute imposes the income tax on the proceeds of the sale of personal property to the extent only that *gains* are derived therefrom by the vendor; * * *." (Court's italics.)

The right to recoup cost upon the sale of personal property in determining "income" does not involve the question of allowable deductions. It is established beyond question that Congress may, in its discretion, deny the taxpayer the right to deduct the loss sustained in one class of transactions as against income from another class of transactions; and a reasonable classification by Congress consistent with sound accounting would not be disturbed.

Here we have no such question, as the losses occurred not only within the same class of transactions as the profits, but, as discussed below, within the confines of a single transaction (see pp. 21-23, *infra*). To hold that such losses are not to be taken into consideration in determining taxable income runs afoul of the constitutional limitation that an unapportioned direct tax must be limited to "income". This does not involve the rule that deductions are within the discretion of Congress.

This Court has in various connections applied sound accounting practice and common sense to the interpretation of the term "income". For example, in *Woolford*

Realty Co. v. *Rose,* 286 U. S. 319, in considering the meaning of the word "income" in the loss carry-over provisions of the Revenue Act of 1926, this Court said that a corporate net loss may not be deemed income.[6]

Again, in *Walsh* v. *Brewster,* 255 U. S. 536, this Court held that no tax was assessable with respect to the proceeds of sale of certain stock, even though at a price above the March 1, 1913, value, "* * * since the owner of the stock did not realize any gain on his original investment * * *" (255 U. S. at 537).

In short, upon the sale of property there can be no "income", and hence no constitutional basis for an income tax, unless and until the cost has been recouped. This is stated by Magill in his work on "Taxable Income" (1936), as follows:

> "In the case of a sale of property having a known cost, the only income is the excess, if any, of the sale price over the cost. Income, therefore, does not mean gross receipts" (p. 305).

This Court did not, in *U. S.* v. *Hudson,* 299 U. S. 498, determine that for all purposes and in all its applications the silver tax is a valid income tax. In that case all of the silver transactions of the taxpayer were profitable. It is to be observed that in its opinion in the *Hudson* case this Court used the term "special income tax." The Government, in its brief in this Court in the *Hudson* case, did not

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[6] "There are two fundamental objections to this method of computation. In the first place, an interpretation of net income by which it is also a net loss involves the reading of the words of the statute in a strained and unnatural sense. The metamorphosis is too great to be viewed without a shock. Certainly the average man supporting a net loss from the operations of his business would learn with surprise that within the meaning of the Congress the amount of his net loss was also the amount of his net income. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' *Maillard* v. *Lawrence,* 16 How. 251, 261; *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560." (*Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 327.)

argue that the silver tax is an income tax for all purposes;[7] though it did inaccurately claim that it was a tax on net profits only.

In any event, the characterization of the tax by this Court in the *Hudson* case, in connection with its retroactive features, does not preclude re-examination of the subject in connection with other applications of the tax.

It is submitted that even if the sale of the silver bullion by petitioner in instalments was properly interpreted as the sale of several interests the tax as applied was not upon income within the meaning of the 16th Amendment.

B. The Silver Tax Is Not a Valid Excise.

The Constitution gives Congress power to levy two classes of taxes: (1) "direct" and (2) "duties, imposts and excises". The first class (except for income taxes) must be apportioned according to the census; and the second class must be uniform. It is therefore necessary in each case involving other than an income tax to classify the tax according to the Constitutional line of distinction.

Excises are historically taxes upon the carrying on or doing of business, or upon the exercise of a particular privilege. From the time of *Hylton* v. *U. S.*, 3 Dall. 171, this Court has applied the historical test to determine whether a particular tax is an excise. *Tuller*, in "The Taxing Power" (1937), says, p. 90:

> "For the present, it is sufficient to say that the term 'excise', as used in the Federal Constitution is clearly used in the *historical sense*. There was no other sense

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[7] *United States* v. *Hudson*, Government Brief in the Supreme Court, pp. 40, 41; "It is immaterial whether this tax would be classified as an income tax for all purposes. See *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 151; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U. S. 271, 284; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387-8. So far as its retroactive effect is concerned, it stands on precisely the same footing as an income tax."

in which to use it. Then, as now, the term had no generic meaning. It had no settled historic meaning in the United States, for relatively few excises had been levied here, and such as had been were based on the English system. But it had a history of 144 years in England. Hence, the term refers to the kind of taxes which were known as excises in England at the time of the adoption of the Constitution and prior thereto and which in that country had been levied and collected as excises." (Author's italics.)

A tax on the profit from the sale of personal property has always been considered a direct tax. *Pollock* v. *Farmers Loan and Trust Co.*, 158 U. S. 601; *Brushaber* v. *Union Pacific Railroad Co.*, 240 U. S. 1. So classified, such a tax cannot also be an excise.

In *Nicol* v. *Ames*, 173 U. S. 509, this Court, in sustaining a tax upon sales at a grain exchange, pointed out that it was a privilege tax and not a tax upon the thing sold or upon the proceeds of the sale thereof. The following language clearly points out the distinction between an excise and a direct tax, placing a tax upon the profits from the sale of property in the latter category:

> "It is not laid upon the property at all, nor upon the profits of the sale thereof, nor upon the safe itself considered separate and apart from the place and the circumstances of the sale" (173 U. S. at 520).
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> • • • • • • •
>
> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded" (p. 521).

The silver tax does not become an excise tax by virtue of its form or statutory description. This point was made

in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 292 and 294, as follows:

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents; * * * To levy a tax by reason of ownership of property is to tax the property. (Citing authorities.) It can not be made an occupation or license tax by calling it so."

It is to be observed that in the *Hudson* case the Government did not argue that the silver tax was an excise; and this Court did not so characterize it.

As applied in the case at bar, the silver tax has been imposed upon isolated sales of silver by a taxpayer who was not engaged in the business of buying and selling silver bullion. It may not be sustained as an excise because (1) it is neither in form nor substance similar to excises as they have been known in the historical sense; and (2) it is payable by all persons without distinction as to whether or not they are engaged in the business of buying and selling silver bullion, and not as a charge for the privilege of engaging in such business; and (3) it is not imposed upon every transaction in silver bullion, even by those engaged in the business.

C. The Decision Below Was Erroneous as a Matter of Construction and Application of the Statute to the Facts in the Case at Bar.

The statute imposes the tax "on all transfers of any interest in silver bullion".

Petitioner's interest in silver bullion consisted of approximately two million ounces. The Court of Claims has sustained an interpretation of the statute which emphasizes the words "all transfers" and ignores the requirement that the transfer that is taxable is of an "interest" in silver bullion. The wording of the statute has been construed

by the court below as the equivalent of "every transfer of silver bullion".

The statute defines the term "interest in silver bullion" to mean "any title or claim to or interest in, any silver bullion or contract therefor". This does not clarify the problem presented in the case at bar. It remains a factual question whether the aggregate of several purchases and sales constitutes the transfer of a single interest or several interests.

Factually it is beyond doubt in the case at bar that the two million ounces of silver bullion owned by petitioner constituted a single and undivided interest. The findings of the Court of Claims clearly establish that the silver bullion was acquired with a single fund, for a single purpose, and was disposed of without change of that purpose (Finding of Fact, Number 19; R. 14). Its sale in chronologically separated lots, for the practical reasons shown by the record, did not change it into several interests, separately taxable. The business purpose in selling in separate lots is a proper factor for consideration. *Helvering* v. *Elkhorn Coal Co.*, 95 F. (2d) 732, 738; Cert. Den., 305 U. S. 605.

Without reviewing the record at length, it should be noted that the evidence and the findings sustain petitioner's position that the sale of the silver bullion in instalments did not, either from the subjective or objective point of view, break up the two million ounces into separate and distinct interests (Findings of Fact, Numbers 13, 14, 15, 16, 17, 18 and 19; R. 11-14). This position has been recognized and approved in connection with the purchase of the silver, as the Bureau of Internal Revenue accepted the average cost of the several instalments purchased as the basis for computation of the gain or loss on each instalment sold. Having recognized that the purchase in instalments constituted an appropriate method of accumulation of a single interest of two million ounces of silver bullion, there was no

justification for disregarding the unity of the several sales which were required for its disposition. The selling period was approximately the same as the buying period, and the market conditions at the time of the sales necessitated selling in instalments, even more than the conditions existing at the time of purchase required its acquisition in that manner (Findings of Fact, Numbers 17 and 18; R. 13-14).

If the Bureau's construction of the statute sustained by the Court of Claims is correct, it would have been possible under the statute for a taxpayer to have sustained a net loss on its purchase and sale of an interest in silver bullion, and yet to have been subjected to a tax. It is scarcely credible that such a result should have been contemplated in connection with the acquisition and disposal of such an interest as petitioner had.

We complain not in respect to the statute, which is susceptible of a fair interpretation, but in respect to the interpretation which has been placed upon it in applying it to the facts of this case. The construction of the statute adopted by the Court of Claims is not a practical, common sense application of the tax to the facts presented in the case at bar, and the determination below should be reviewed in order to correct a manifest error.

D. The Disallowed Expenses Were Necessary in Connection With the Acquisition, Holding and Disposing of the Silver Bullion and Were Not in the Nature of Overhead.

The Court of Claims said (R. 20) that legal fees are not specified as allowable in the statute, and therefore are not properly deductible in determining the taxable profit.

The statute, however, permits deduction of "necessary expenses actually incurred in holding, processing, or transporting the interest in silver bullion". The legal fee was incurred through the retainer of special attorneys for advice

in connection with the acquisition, holding and disposal of the silver (Finding of Fact, Number 21; R. 14-15). It was not practicable for petitioner to engage in this transaction without legal advice as to its liability for taxes, both in connection with the acquisition and in connection with the sale thereof, and as to its rights and obligations, in view of the silver policy of the Government. The record shows, without contradiction, that the services rendered related to these questions, and it was stipulated that the fee paid was reasonable in amount. The attorneys were not petitioner's regular counsel, and the fee paid was a special expense which would not have been incurred had it not been for the silver transaction. It cannot be said, therefore, that the fee was in the nature of overhead. It was a necessary expense actually incurred in holding the interest in silver bullion. Under the circumstances, there was no justification for denying the deduction of the fee as a necessary expense, and the amount of additional tax paid by reason of such disallowance should have been refunded.

Conclusion.

The determination of the Court of Claims is based upon an interpretation of the silver tax statute which renders it unconstitutional as a direct and unapportioned tax on gross receipts, and not upon income. The determination ignores the evidence and the findings establishing the single and indivisible character of petitioner's interest in silver bullion. In denying the right of the taxpayer to balance losses on similar and related transactions against taxable profits, the Court of Claims has opened the door to a type of transactions tax which cannot conceivably be deemed a tax on income, and which does not legitimately fall within the constitutional scope of an excise. That result is not warranted by the statute, and is not necessary as applied to the facts of the case at bar.

For these reasons it is respectfully submitted that a Writ of Certiorari to the Court of Claims should be granted herein.

Respectfully submitted,

BAER & MARKS,
Attorneys for Petitioner;
By DONALD MARKS.

Dated: New York, December 31, 1940.

DONALD MARKS,
JULIUS B. BAER,
DAVID STOCK,
MURRAY M. WEINSTEIN,
Of Counsel.

APPENDIX.

Pertinent Excerpts From Statutes and Regulations Involved.

Revenue Act of 1926 (44 Stat. 9, 99):

"Sec. 800. * * * there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule."

Subdivision 10 of Schedule A of Title VIII of the Revenue Act of 1926, as added by Section 8 of the Silver Purchase Act of 1934 (48 Stat. 1178, 1179):

"10. Silver, and so forth, sales and transfers.—On all transfers of any interest in silver bullion, if the price for which such interest is or is to be transferred exceeds the total of the cost thereof and allowed expenses, 50 per centum of the amount of such excess. On every such transfer there shall be made and delivered by the transferor to the transferee a memorandum to which there shall be affixed lawful stamps in value equal to the tax thereon. * * * This subdivision shall apply (1) with respect to all transfers of any interest in silver bullion after the enactment of the Silver Purchase Act of 1934, * * *

As used in this subdivision

* * * The term 'transfer' means a sale, agreement of sale, agreement to sell, memorandum of sale or delivery of, or transfer, whether made by assignment in blank or by any delivery, or by any paper or agreement or memorandum or any other evidence of transfer or sale; or means to make a transfer as so defined.

The term 'interest in silver bullion' means any title or claim to, or interest in, any silver bullion or contract therefor.

The term 'allowed expenses' means usual and necessary expenses actually incurred in holding, processing, or transporting the interest in silver bullion as to which an interest is transferred (including storage, insurance, and transportation charges but not including interest, taxes, or charges in the nature of overhead), determined in accordance with regulations issued hereunder."

Regulations:

Treasury Regulations 85 relating to tax on transfers of interest in silver bullion under Title 8, Schedule A, Subdivision 10 of the Revenue Act of 1926, as added by Section 8 of the Silver Purchase Act of 1934:

"Chapter VI, Art. 60. Scope of chapter.—The provisions of this chapter apply with respect to transfers of any interest in silver bullion completed after 9 P. M., eastern standard time, June 19, 1934, the time of the enactment of the Silver Purchase Act of 1934.

Art. 61. Memorandum on transfers.—On every transfer of an interest in silver bullion, whether or not subject to tax, the transferor shall, * * * deliver to the transferee a memorandum in duplicate on form 2 (Silver) under oath, * * *

Art. 62. Delivery of memorandum to the collector.—The memorandum in duplicate shall be delivered to the proper collector within 30 days from the transfer, * * *

Art. 63. Affixing of stamps.—If the transfer is taxable, stamps in value equal to the amount of tax shall be affixed to the original of the memorandum before delivery to the transferee, * * *"

FILED
FEB 14 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 668

MANUFACTURERS TRUST COMPANY,
Petitioner,

vs.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITIONER'S REPLY BRIEF.

DONALD MARKS,
JULIUS B. BAER,
DAVID STOCK,
MURRAY M. WEINSTEIN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 668

MANUFACTURERS TRUST COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITIONER'S REPLY BRIEF.

Several items in the Government's brief require answer, and the Court's attention is respectfully called to the following points.

1. An inaccuracy in the statement of facts at page 3 is important in its bearing upon the singleness of the interest transferred by petitioner. The Government states that "in view of the nature of the London market, the Vice President concluded that it was better to sell the silver in lots over a longer period of time"; and then recites that the sales were made from December 3, 1935, to January 6, 1936. It is to be noted, however, that the special findings of fact set forth only that the Vice President, in view of the nature of the London market, and in the exercise of his best judgment, concluded that it would be imprudent to offer the entire two

million ounces of silver bullion for sale in one lot either "at the market" or "at the fixing" or "at a price" (Finding 14, R. 12); and that between December 10, 1935, and January 3, 1936, there was no opportunity to make any sales because of the disturbed conditions of the market (Finding 15, R. 13). It should be noted that the Court found specifically that petitioner, both in the purchase and sale of the silver bullion, considered that it was engaged in a single transaction, and was acquiring and disposing of the silver as a single and entire investment, and that in selling the silver in instalments petitioner did not consider that it was separately transferring different interests in silver bullion (Finding 19, R. 14). These facts, supplemented by the finding that the nature of the market made it necessary to dispose of the silver in instalments, and that petitioner acted in a reasonable and prudent manner in marketing such a quantity of silver (Findings 14, 15 and 17, R. 12-14), constitute the basis of petitioner's claim that it transferred but a single interest in silver bullion. The statement in the Government's brief, made to support the argument that petitioner chose to split up this single interest into several interests, separately taxable, is in conflict with the Findings of Fact mentioned above.

2. The Government argues (Point 1, p. 5) that the case is disposed of by reference to the power of Congress to grant, limit or withhold deductions in determining income subject to tax. The cases cited in support of this proposition relate to those provisions of the Revenue Laws denying the right of the taxpayer to deduct from ordinary income net losses from special types of securities transactions. No case has been found in which any Court has held that the power of Congress to limit or withhold deductions extends so far as to deny the right to recoup capital in determining whether taxable income has arisen out of any single transaction or related group of transactions. It is one thing to group short

term purchases and sales of securities and to deny a deduction of a net loss on all transactions within such group. The reasonableness of the grouping is for Congress to determine. It is quite another thing, however, for Congress to provide that all profitable sales within the group shall be taxable without allowance of offset of losses on unprofitable sales within the group. That is what has been done in the Silver Tax Law, as applied in this case; and such a construction of the law results in a tax upon gross receipts and not upon income.

3. The Government urges (Point 1, p. 5) that the silver tax is also a valid excise; and asserts that a tax with respect to the profit upon the sale of personal property has always been considered an indirect tax. *Willcuts* v. *Bunn*, 282 U. S. 216, is cited as authority for this statement; but it scarcely sustains that burden. That case merely decided that the imposition of the income tax upon the profits from the sale of state bonds was not a direct burden on the borrowing capacity of the state. The Court was dealing with the income tax and no question was presented concerning the nature or validity of an excise. It is true that Chief Justice Hughes, in the opinion in that case, speaks of a tax upon profits made upon purchases and sales as an "excise upon the result of the combination of several factors including capital investment and, quite generally, some measure of sagacity; * * *". It is plain, however, that the Chief Justice was using the word "excise" in its generic sense, and not in its constitutional setting. Had the Government's argument ever been tenable, the Sixteenth Amendment would have been unnecessary. In *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, this Court emphasized the fact that the constitutional classification of direct taxes, on the one hand, and duties, imposts and excises, on the other, is mutually exclusive, saying that in the Constitution the latter

class is "put in antithesis to direct taxes" (158 U. S. at 622). In both the *Pollock* case and *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, this Court treated a tax on gains from sales of personal property as a direct tax, and therefore excluded such taxes from the constitutional group of excises.

The warning contained in *Eisner* v. *Macomber*, 252 U. S. 189, that Congress may not, by a definition of income, escape from constitutional limitations, should be observed today more closely than ever when novel and ingenious methods of taxation are increasingly resorted to by Congress and state legislatures. Constitutional limitations are entitled to respectful consideration, and should not be whittled away by legislative subterfuges.

4. The Government makes the bald assertion (p. 6) that each sale amounted to a separate transfer of an interest in silver, within the exact words of the statute. This statement, as pointed out above, is in conflict with the Findings of Fact of the Court below. Tested either subjectively or objectively, petitioner's interest in silver was single and undivided, and the instalment sales did not alter that concept.

5. The Government argues (p. 7) that the legal fees were "in the nature of overhead". This argument is not tenable. Overhead expenses are those which are not traceable directly to a particular activity or project, but are apportioned generally among several different activities or projects. See *Church, Overhead Expenses*, p. 1 (McGraw Hill, 1930); *Clark, Economics of Overhead Cost*, p. 1 (Univ. Chg. Press, 1923).

The item of legal expenses was incurred directly and solely in connection with the acquisition, holding and disposition of the silver bullion, and was not traceable to or connected with any other activity of petitioner (Finding, p.

21, R. 14, 15). It was therefore within the statutory class of allowable deductions.

Respectfully submitted,

BAER & MARKS,
Attorneys for Petitioner,
By DONALD MARKS.

Dated: New York, February 11th, 1941.

DONALD MARKS,
JULIUS B. BAER,
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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 668

MANUFACTURERS TRUST COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 17–20) is reported in 32 F. Supp. 289.

JURISDICTION

The judgment of the Court of Claims was entered April 1, 1940 (R. 21). On May 28, 1940, the petitioner filed a motion for a new trial which was overruled on October 7, 1940 (R. 21). The petition for a writ of certiorari was filed January 3, 1941 (R. 21). The jurisdiction of this Court is

invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether the silver tax should be computed upon individual profitable sales without regard to other unprofitable sales and whether, if so construed and applied, it is a constitutional levy either as a special income tax or a valid excise.

2. Whether a deduction for legal expenses was properly disallowed.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix (*infra,* pp. 8–10).

STATEMENT

The special findings of fact of the Court of Claims (R. 9–16) may be summarized as follows:

Petitioner, a banking corporation, in order to minimize or recoup its losses on certain German investments, sold the investments and used the proceeds to purchase approximately two million ounces of silver in London. This silver was purchased between September 6, 1934, and October 5, 1934, at a cost of approximately $1,000,000 in eight separate purchases at varying prices (R. 9–10).

About December 3, 1935, the Silver Committee of petitioner decided to sell all of the silver bullion due to the declining price trend of silver and on *or* about that date it instructed the vice-presi-

dent to sell all of the silver bullion owned by petitioner and to carry out the selling during the two weeks' period following that date (R. 11).

However, in view of the nature of the London market, the vice-president concluded that it was better to sell the silver in lots over a longer period of time. Accordingly, between December 3, 1935, and January 6, 1936, petitioner's vice-president gave a number of orders to its London correspondent to sell certain amounts of the silver, the orders being carried out according to his instructions as far as possible. The silver was sold in 13 different transactions at varying prices. The sales made from December 3, 1935, to and including December 17, 1935 (no sales being made between December 17, 1935, and January 3, 1936) were made at prices above average cost, while the sales made on January 3 and 6, 1936, were made at prices below average cost (R. 12–13).

The petitioner incurred expenses of $6,287.61 in connection with the holding, processing or transporting of its interest in silver bullion. In addition to these expenses, petitioner paid legal fees amounting to $2,095.10 to counsel who were retained for the purpose of advising in connection with the proposed purchase of the silver and the legal problems involved therein (R. 14).

The total receipts from the sale and disposal of the silver bullion were $1,142,853.27. The cost,

exclusive of the expenses enumerated above, was $1,009,410.31. The gross profit therefrom was $133,442.96, and the net profit, after deduction of expenses enumerated above, including the legal fee, was $125,060.25 (R. 15).

The Commissioner of Internal Revenue ruled that each of the sales of silver bullion which resulted in an excess of receipts therefrom over average cost (including all expenses) was subject to the tax imposed by the Silver Purchase Act. As a result, petitioner filed returns, or memoranda, for each sale. Upon these returns, taxes aggregating $74,969.66 were paid by the affixation of silver-tax stamps involuntarily and under protest (R. 15).

A claim for refund was duly filed by petitioner and rejected by the Commissioner of Internal Revenue. Later, upon the suggestion of the Collector of Internal Revenue for the Second District of New York, petitioner paid additional taxes due to the disallowance of the legal fee as an expense. Claim for refund for this additional tax was also filed and rejected (R. 16).

Upon the foregoing facts, the Court of Claims found that the petitioner was not entitled to recover and dismissed the petition (R. 16).

ARGUMENT

There are no conflicts, and the decision below is plainly correct. The sweeping constitutional and statutory issues raised by petitioner are insub-

stantial, and do not call for further judicial consideration.

1. Petitioner contends first that the silver tax is not an income tax within the Sixteenth Amendment, since losses on some sales are not deductible from gains on other sales. But this Court has already ruled in *United States* v. *Hudson,* 299 U. S. 498 that the silver tax is a "special income tax" (p. 500), and the broad power of Congress to grant, limit, or withhold deductions is well established. Cf. *Helvering* v. *Ind. Life Ins. Co.,* 292 U. S. 371, 381; *White* v. *United States,* 305 U. S. 281, 292.

Even apart from the Sixteenth Amendment, the silver tax is a valid excise. A tax with respect to profit upon sale of personal property has always been considered an indirect tax. Compare *Willcuts* v. *Bunn,* 282 U. S. 216, where the Court sustained a Federal tax upon profit derived from the sale of municipal bonds, and described the tax as (p. 228) "an excise upon the result of the combination of several factors, including capital investment and, quite generally, some measure of sagacity." See also *United States* v. *Stewart,* No. 13, present Term. Moreover, since the tax is imposed on the *transfer* of any interest in silver, its validity as an excise is beyond question. *Bromley* v. *McCaughn,* 280 U. S. 124; *New York Trust Co.* v. *Eisner,* 256 U. S. 345; *Knowlton* v. *Moore,* 178 U. S. 41.

2. Petitioner's contentions with respect to the interpretation of the statute are equally without

substance. Petitioner stresses the word "interest" and argues that only one "interest" in silver bullion was transferred, namely, the entire holding of over 2,000,000 ounces, and that it should not make any difference that the transfer was accomplished for business reasons through a series of transactions. It is said that petitioner's subjective intent, treating the total amount as a single and undivided interest, should be conclusive. But regardless of such intent, the plain fact is that it sold the silver in small lots, at different times, presumably to different persons, from different storehouses, and at different prices (R. 12, 13). In these circumstances, as the court below held, it is impossible to deny that each sale amounted to a separate transfer of an interest in silver within the exact words of the statute. The language of the act is plain and not susceptible to petitioner's construction.

Finally, it is contended that legal fees should have been deducted. But the statute merely provides for the deduction of "allowed expenses" which are defined as "usual and necessary expenses actually incurred in holding, processing, or transporting the interest in silver bullion * * * (including storage, insurance, and transportation charges but not including interest, taxes, or charges in the nature of overhead) * * *." It is to be noted that allowable expenses must be "incurred in holding, processing, or transporting";

and, as the court below observed (R. 20) there is nothing in the statute allowing the deduction of legal fees. Furthermore, as such fees are in the nature of overhead which is specifically excluded as an allowable expense, it is submitted that the decision of the court below was correct.

CONCLUSION

There is no conflict of decision and petitioner's principal contentions are foreclosed by decisions of this Court. No sufficient reason appears for granting the writ and it should therefore be denied.

Respectfully submitted.

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FEBRUARY 1941.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE VIII.—STAMP TAXES.

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax (U. S. C., Title 26, Secs. 900, 908).

Silver Purchase Act of 1934, c. 674, 48 Stat. 1178:

SEC. 8. Schedule A of Title VIII of the Revenue Act of 1926, as amended (relating to stamp taxes), is amended by adding at the end thereof a new subdivision to read as follows:

"10. *Silver, and so forth, Sales and Transfers.*—On all transfers of any interest in

silver bullion, if the price for which such interest is or is to be transferred exceeds the total of the cost thereof and allowed expenses, 50 per centum of the amount of such excess. On every such transfer there shall be made and delivered by the transferor to the transferee a memorandum to which there shall be affixed lawful stamps in value equal to the tax thereon. Every such memorandum shall show the date thereof, the names and addresses of the transferor and transferee, the interest in silver bullion to which it refers, the price for which such interest is or is to be transferred and the cost thereof and the allowed expenses. * * * The provisions of this subdivision shall extend to all transfers in the United States of any interest in silver bullion, and to all such transfers outside the United States if either party thereto is a resident of the United States or is a citizen of the United States who has been a resident thereof within three months before the date of the transfer or if such silver bullion or interest therein is situated in the United States; and shall extend to transfers to the United States Government (the tax in such cases to be payable by the transferor), but shall not extend to transfers of silver bullion by deposit or delivery at a United States mint under proclamation by the President or in compliance with any Executive order issued pursuant to section 7 of the Silver Purchase Act of 1934. The tax under this subdivision on transfers enumerated in subdivision 4 shall be in addition to the tax under such subdivision. This subdivision shall apply (1) with respect to all transfers of any interest in silver bullion after the enactment of the Silver Purchase Act of

1934, and (2) with respect to all transfers of any interest in silver bullion on or after May 15, 1934, and prior to the enactment of the Silver Purchase Act of 1934, except that in such cases it shall be paid by the transferor in such manner and at such time as the Commissioner, with the approval of the Secretary of the Treasury, may by regulations prescribe, and the requirement of a memorandum of such transfer shall not apply.

* * * * *

"The term 'transfer' means a sale, agreement of sale, agreement to sell, memorandum of sale or delivery of, or transfer, whether made by assignment in blank or by any delivery, or by any paper or agreement or memorandum or any other evidence of transfer or sale; or means to make a transfer as so defined.

"The term 'interest in silver bullion' means any title or claim to, or interest in, any silver bullion or contract therefor.

"The term 'allowed expenses' means usual and necessary expenses actually incurred in holding, processing, or transporting the interest in silver bullion as to which an interest is transferred (including storage, insurance, and transportation charges but not including interest, taxes, or charges in the nature of overhead), determined in accordance with regulations issued hereunder.

"The term 'memorandum' means a bill, memorandum, agreement, or other evidence of a transfer."

(U. S. C., Title 26, Sec. 904a.)

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